

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, :
 :
 v. : INDICTMENT NO.
 :
 TOTADA R. SHANTHAVEERAPPA, :
 M.D., a/k/a T.R. SHANTHA, M.D., : 1:05-cr-612-RWS
 DAN U. BARTOLI, :
 :
 Defendants. :
 _____ :

**GOVERNMENT'S RESPONSE TO
DEFENDANTS' MOTION TO SUPPRESS**

Statement of Facts

The 87-count indictment in this case charges defendants Totada R. Shanthaveerappa, M.D., a/k/a T.R. Shantha, M.D. ("Shantha"), and Dan U. Bartoli ("Bartoli") with health-care fraud and distributing unapproved and misbranded drugs. Shantha is also charged with money laundering. Shantha is a medical doctor. He has been licensed to practice medicine in the State of Georgia since 1972. Shantha owns and operates a medical clinic in Stockbridge, Georgia, which does business under the name "Integrated Medical Specialists." Shantha is the Medical Director of the clinic, and Bartoli is Shantha's medical assistant. Shantha advertises that his clinic provides "safe

and effective, nontoxic, scientifically based alternative methods that can cure or control most cancer and other chronic disease." The indictment alleges that Shantha and Bartoli injected numerous patients with unapproved and misbranded drugs, including Dinitrophenol ("DNP"), a commercial-grade weed killer and insecticide, and Ukrain, a substance manufactured in Austria, that has not been approved for medical use in the United States. The indictment also alleges that Shantha and Bartoli defrauded numerous health insurance companies by submitting false and misleading claims for payment, which disguised the types of drugs and treatments they were providing to patients at the clinic.

Prior to the Indictment, on October 3, 2003, the Government applied for and received a warrant to search the offices of Integrated Medical Specialists at 115 Eagle Spring Drive, Suite A, Stockbridge, Georgia, 30281 ("Shantha's office"). In support of the application for the warrant, the Government submitted the affidavit of Special Agent Robert D. Kuykendall of the U.S. Food & Drug Administration ("FDA").

Argument and Citation of Authority

Defendants contend that the evidence obtained in the search should be suppressed for a variety of reasons. The evidence will show, however, that any technical defects in the warrant should be overlooked, and defendants' motion to suppress should be denied because the search falls within the "good faith" exception set forth by the Supreme Court in United States v. Leon, 468 U.S. 897, 922 (1984).

The government will now address each of the main points raised by defendants in the order set forth in defendants' brief:

(A) Whether the search warrant identified the things to be seized with sufficient particularity.

"The Fourth Amendment requires that warrants particularly describe . . . the . . . things to be seized. . . . A description is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized." United States v. Wuagneux, 683 F.2d 1343, 1348 (11th Cir. 1982)(citations and punctuation omitted), cert denied 464 U.S. 814 (1983). "[A] warrant that simply authorizes the seizure of all files, whether or not relevant to a specified crime, is insufficiently particular." Voss v. Bergsgaard, 774 F.2d 402, 406 (10th Cir. 1985). But "in cases

involving a pervasive scheme to defraud, all the business records of the enterprise may properly be seized." United States v. Sawyer, 799 F.2d 1494, 1508 (11th Cir. 1986).

[T]he supreme Court has recognized that effective investigation of complex white-collar crimes may require the assembly of a "paper puzzle" from a large number of seemingly innocuous pieces of individual evidence: The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession.

Wuagneux, 683 F.2d at 1349 (citing Andresen v. Maryland, 427 U.S. 463, 481 n10 (1976)).

In this case, the warrant authorized Special Agent Kuykendall to search Shantha's office for the following:

- (1) All patient records to include, but not limited to: Any medical documentation and billing documentation regarding patients;
- (2) Employee work schedules/calendars, time cards, personnel records, payroll records, and other records relating to employees of the above mentioned corporations; Medicare manuals and/or private insurer manuals, guidelines or instructional guidance and any correspondence between T.R. Shantha, M.D. and Medicare and/or private insurers;
- (3) Any and all billing information to include but not limited to documents related to the following payers: Medicare, Medicaid, and Private insurance;

- (4) Corporate banking records;
- (5) Personal banking records of T.R. Shantha, M.D.
- (6) Any business contracts, billing information, payments received, correspondence and other records related to other persons and entities;
- (7) Any and all federal and state corporate tax records to include 1099, W2, 940 and 941 forms issued by Integrated Medical Specialists;
- (8) Receipt disbursement journals and ledgers;
- (9) Computer systems to include passwords, hardware, software, peripherals, and electronically stored data;
- (10) Aloe and/or aloe derived products used in part or in whole as treatment for disease including but not limited to cancer and Lyme disease.
- (11) Colloidal Silver, used in part or in whole as treatment for disease including but not limited to cancer and Lyme disease.
- (12) DNP and/or other substances labeled as or otherwise indicated to be a "heating agent" used in the treatment for weight loss and/or disease including but not limited to cancer and Lyme disease.
- (13) Personal and business records related to the purchase, sale, transfer and administering of aloe or aloe derived products, Colloidal Silver, and DNP or other "heating agent" used in part or in whole as treatment for disease and/or weight loss. These records include, but are not limited to books, records, receipts, notes, ledgers, letters of credit, correspondence, memorandums, mailing envelopes, facsimiles, purchase orders, purchase invoices, purchase agreements/contracts, sales invoices, licenses, applications, and shipping records.

- (14) Personal and business records related to patients who have been or may be treated through the use of aloe, Colloidal Silver, DNP, or other "heating agent," and/or other substances used in treatment of disease or weight loss which have not been proven as safe and effective. Records include patient files.
- (15) Any homemade or otherwise unapproved device used in the diagnoses of disease.
- (16) Any unapproved, unlabeled, and/or unknown substance.
- (17) Computers and/or computer hardware used to store data including hard drives, diskettes, tapes, compact disks, or other media capable of storing information.
- (18) And any and all other items which constitute contraband, evidence, fruits, and/or instrumentalities of crimes against the United States including, but not limited to violations of Title 18, United States Code, (U.S.C.) 1347: Health Care Fraud.

Special Agent Kuykendall's affidavit showed that Shantha's business was permeated with fraud (see section (B) of this brief, *infra*); therefore, the government had no obligation to restrict the search to specific documents. Sawyer, 799 F.2d at 1508. Special Agent Kuykendall's affidavit, which was attached to both the application and the warrant as "Exhibit A" and incorporated into both the application and the warrant by use of the words "SEE ATTACHMENT A," described the scope and operation of the health-care fraud scheme thought to be operated by

Shantha and Bartoli. Special Agent Kuykendall's affidavit also explained in detail how Shantha and Bartoli were using unapproved new drugs to treat patients at Shantha's clinic and further explained the reasons why Special Agent Kuykendall believed Shantha and Bartoli were involved in an ongoing health-care fraud scheme, in violation of 18 U.S.C. § 1347.

Even if this court were to find that the warrant failed to describe the things to be seized with sufficient particularity, however, defendants would still not be entitled to the relief they seek because the search falls within the "good faith" exception set forth by the Supreme Court in United States v. Leon, 468 U.S. at 922. See United States v. Norton, 867 F.2d 1354, 1360-61 (11th Cir. 1989).

(B) Whether the scope of the search warrant was too broad.

In the previous section, which dealt with particularity, the question was whether the agents executing the warrant had enough guidance to prevent a general rummaging through all of the defendants' belongings and records. See Andresen v. Maryland, 427 U.S. 463, 480 n. 10 (1976). In this section, which deals with the breadth of the warrant, the question is whether the categories of documents specified are so broad as to exceed

the scope of the crimes alleged in the warrant. See United States v. Leveto, 343 F.Supp.2d 434, 449 (W.D. Pa. 2004).

"To determine whether the warrant was overbroad, we must compare the scope of the search and seizure authorized by the warrant with the ambit of probable cause established by the supporting affidavit." In re Impounded Case (Law Firm), 840 F.2d 196, 200 (3d Cir. 1988). In doing so, "the phrases in a search warrant must be read in context and not in isolation." United States v. Conley, 4 F.3d 1200, 1208 (3d Cir. 1993), citing United States v. Johnson, 690 F.2d 60, 64 (3d Cir. 1982), cert. denied, 459 U.S. 1214 (1983). In other words, the affidavit must be read as a whole. United States v. Conley, *supra*, 4 F.3d at 1208. "The fact that the warrant authorized a search for a large amount of records does not necessarily render the search invalid so long as there exists a sufficient nexus between the evidence to be seized and the alleged offenses." United States v. American Investors of Pittsburgh, Inc., 879 F.2d 1087 (3d Cir. 1989), cert. denied, 493 U.S. 955 (1989).

The warrant at issue in this case authorized a search for all patient records; employee personnel and payroll records; Medicare manuals and private insurer manuals, correspondence between Shantha and Medicare or private insurers; billing

information; banking records of Shantha and his corporations; records of payments received; tax records for Integrated Medical Specialists; receipt disbursement journals and ledgers; computer systems; aloe, Colloidal Silver, DNP and other substances used in the treatment of cancer and Lyme Disease; records related to the purchase, sale, transfer, and administering of aloe, Colloidal Silver, DNP; records of patients who have been treated with aloe, Colloidal Silver, or DNP; any homemade or otherwise unapproved device used in the diagnoses of disease; any unapproved, unlabeled, and/or unknown substance; computers and computer hardware; and any and all other items which constitute contraband, evidence, fruits, and/or instrumentalities of crimes against the United States including, but not limited to violations of Title 18, United States Code, (U.S.C.) 1347: Health Care Fraud. See "Exhibit B" attached to application and warrant.

The affidavit in support of the warrant provided probable cause to believe that Shantha and Bartoli were engaged in an ongoing practice of health-care fraud and that they were fraudulently billing their patients and their patients' insurance companies on a regular basis. Specifically, the affidavit alleged, in pertinent part, as follows:

In the 1930s, DNP was used as a weight-loss drug. It was banned in 1938, however, because it was discovered that ingestion of DNP is toxic to the liver, kidney, and nervous system and can cause hyperthermia, profuse sweating, dehydration, tachycardia, restlessness, manic behavior, nausea, vomiting, convulsions, and even death. (Kuykendall affidavit, ¶ 4). DNP is currently used as a pesticide and weed killer. (Kuykendall affidavit, ¶ 4).

In December 2002, the FDA was investigating a physician named Nick Bachynsky in connection with his use of DNP. Bachynsky informed the FDA that he believed Shantha was also treating patients with DNP. Bachynsky also informed the FDA that Shantha had traveled to Italy in the summer of 2002 to see the DNP procedure conducted on cancer patients. Bachynsky also stated that he told Shantha there are other "uncouplers," such as Usnic Acid, which are nutritional supplements in the U.S., but that the use of such a natural substance is also illegal in the U.S. if it is administered by any route other than orally. (Kuykendall affidavit, ¶ 5).

In December 2002, Special Agent Kuykendall interviewed Misty Moore, who stated that she was treated by Shantha for Lyme disease. She also stated that Shantha was doing "experiments"

in a back room at his clinic with at least two other patients who were receiving DNP. Moore stated that the staff tried to keep the use of DNP "hush, hush," but the whole clinic knew it was being administered. (Kuykendall affidavit, ¶ 7).

FBI Special Agent Mike Badolato subpoenaed Misty Moore's medical claims from United Health Care for her treatment with Shantha. The interoffice billings and the United Health Care medical claims confirmed that Shantha had billed for treatment inconsistent with the treatment he actually provided to Misty Moore. Further, according to representatives of United Health Care, based on Moore's diagnosis of Lyme disease, the mode of treatment used by Shantha is inappropriate and/or not consistent with recognized treatment protocols for Lyme disease. (Kuykendall affidavit, ¶ 8).

On January 7, 2003, Special Agent Kuykendall went to the offices of Integrated Medical Specialists at 115 Eagle Spring Drive, Suite A, Stockbridge, GA 30281, in an undercover capacity. Special Agent Kuykendall was met by Bartoli, who identified himself as Shantha's Patient Coordinator. Special Agent Kuykendall told Bartoli that treatment was needed for his twelve-year old niece who was recently diagnosed with Lyme disease. Bartoli gave Special Agent Kuykendall a tour of the

clinic and pointed out two primary treatment methods utilized, a hyperbaric oxygen "chamber," and a hyperthermia tube used to heat the body. Special Agent Kuykendall asked about DNP, and Bartoli stated that the clinic used DNP in Mexico and Canada, but the FDA would not allow the treatment in the United States. Bartoli stated that treatment for Lyme disease would be a two week program consisting of the above listed therapies along with an IV of antibiotics at a cost of \$10,500. Bartoli stated that the patient would need to provide previous medical files and or diagnosis records or could simply be tested in the clinic by a device he uses to identify and diagnose diseases. Bartoli stated that the device was unapproved, but was used in his office. He explained the process as having the patient lick a small piece of paper which is placed in the device, and from their DNA, the patients' "frequencies" are read to diagnose any existing condition. Bartoli insinuated the device was his invention. During the tour, Special Agent Kuykendall observed numerous files and records related to the treatment of patients. (Kuykendall affidavit, ¶ 9).

On July 1, 2003, Special Agent Kuykendall interviewed Donna Miller, a medical assistant previously employed with Integrated Medical Specialists. Miller stated that Shantha frequently used

a substance in capsule form that he would not identify to staff members. According to Miller, Shantha gave the drug to cancer patients, claiming that it would heat up and "kill off" cancer cells. Miller recalled three patients who received the unknown drug and died during treatment: Peter J. Kelly, Mattie Parker, and a young woman named Renee. (Kuykendall affidavit, ¶ 10).

On July 2, 2003, Special Agent Kuykendall interviewed David Key, co-owner of Hudson Bridge Compounding Pharmacy, in Stockbridge, Georgia. Key stated that Shantha had contacted him in approximately 2001 and inquired about the filling of capsules with a substance to be provided by Shantha. Key stated that after agreeing to do this, Shantha provided a container of powder to the pharmacy that was labeled as dangerous, with skull and crossbones and warnings such as "hazardous" and "toxic." Key could not recall the name of the substance, but stated that his business partner had researched the substance and found that it was an insecticide used in the 1950s. Key said he asked Shantha to take the substance away, and Shantha did so without Hudson Bridge Compounding Pharmacy filling any capsules. (Kuykendall affidavit, ¶ 11).

On July 18, 2003, Special Agent Kuykendall interviewed Gary Pendexter, co-owner of The Compounding Shop, Inc. in

Stockbridge, Georgia. Pendexter stated that he filled approximately 1000 capsules for Shantha using an unknown substance provided to him by Shantha. Pendexter stated that, after filling the capsules, he discussed with Shantha what label to put on the drug, and Shantha told Pendexter not to label the capsules. Pendexter stated that he informed Shantha he must label the drugs, and Shantha eventually told Pendexter to label the drugs, "Metabolic Blocker," stating they would be used for weight loss. Pendexter provided agents with a copy of the formula worksheet prepared at the time of the transaction, which shows the true identity of the substance was DNP. (Kuykendall affidavit, ¶ 12).

On July 21, 2003, Special Agent Kuykendall interviewed Geoff T. Cauble, a part-time employee at Integrated Medical Specialists. Cauble stated that, after researching DNP, he was disturbed by its use and discussed with Shantha the fact that DNP was dangerous. Cauble said this was the same time that Shantha brought an unknown substance into the clinic for use in weight management. Cauble stated that Shantha purchased an encapsulating machine in which to make his own capsules. Cauble said the staff recognized that what Shantha referred to as Metabolic Hyperthermia Therapy (MHT) was actually the use of

DNP. Cauble stated that the staff discussed the fact that Shantha received a substance assumed to be DNP that arrived in a container labeled with skull and crossbones. Regarding patients receiving DNP or the unknown substance, Cauble recalled one patient who received the unknown substance via capsule and experienced severe mouth and throat ulcers, and was ultimately hospitalized. Cauble stated that when the woman was in the hospital's emergency room, the attending physician telephoned Integrated Medical Specialists to ask what the patient had been treated with because she was having such a severe reaction. According to Cauble, Shantha instructed the staff not to release any information, and the patient died soon after this treatment. Special Agent Kuykendall later identified this patient as Mattie Parker. (Kuykendall affidavit, ¶ 14).

On July 29, 2003, Special Agent Badolato and Special Agent Scott Stephan, FBI, interviewed Zoltan Gallovits, son of now deceased patient Martha Gallovits. Martha Gallovits was treated at Integrated Medical Specialists by Shantha. Gallovits stated that Shantha first gave his mother an injection to determine if she had cancer. Gallovits indicated the injection contained chicken embryo, and that if his mother reacted with a rash, it meant she did have cancer. Gallovits said Shantha was injecting

his mother with chemotherapy and experimenting with her. Gallovits discussed another treatment conducted by Shantha whereby Shantha combined his mother's blood with a "formula from Brazil" and injected it into her. Gallovits stated that his mother died three weeks after receiving treatment from Shantha. (Kuykendall affidavit, ¶ 15).

On August 4, 2003, Special Agent Kuykendall received five medicine bottles containing unknown substances that were used in the treatment of Martha Gallovits. The five bottles were initially provided to Zoltan Gallovits by Shantha for home treatment of his mother. Mr. Gallovits gave the bottles to Cynthia Bush, an employee of Integrated Medical Specialists at the time. Bush subsequently provided the bottles to Special Agent Kuykendall with Mr. Gallovits' permission. Bottle 1 is labeled to contain "Cisplatin." Bottle 2 is labeled to contain "Taxol." Bottle 3 is labeled, "Heart & Circulation." Bottle 4 bears a plain white label with no markings, letters, or print. Bottle 5 is labeled, "Royal Custom Homeopathic Nasal Spray." According to Bush, the company Royal Custom Homeopathic is a name that Shantha and Bartoli made up. (Kuykendall affidavit, ¶ 16).

On September 30, 2003, Special Agent Kuykendall received information from Jonathan Litzau, Chemist and Lead Analyst, FDA Forensic Chemistry Center (FCC), regarding these five bottles which were previously shipped by Special Agent Kuykendall to the FCC for analysis. Litzau stated that the bottle labeled as Cisplatin does not contain Cisplatin at the concentration administered as a dose of "Cisplatin." Litzau stated that the bottle contains approximately 3 parts per billion of Platinum, and a normal dose of Cisplatin should contain approximately 1,000 parts per million. The bottle labeled Taxol was analyzed, and no Taxol was detected during initial analysis. Litzau stated the bottles do test positive for the presence of urea, creatinine, and other substances unknown at this time. Litzau stated that urea and creatinine are components of urine. (Kuykendall affidavit, ¶ 17).

On August 4, 2003, FBI Special Agents Badalato and Stephan interviewed Cynthia Bush regarding her past employment with Shantha. Bush told the agents about inappropriate insurance billings and the injection of IV Colloidal Silver by Bartoli. Bush provided documents to Special Agent Badalato and Special Agent Stephan regarding insurance billings and patient treatment. These documents reflect insurance billing by Shantha

for treatment utilizing intravenous alo. (Kuykendall affidavit, ¶ 18).

On August 7, 2003, Special Agents Kuykendall and Badolato re-interviewed Donna Miller. Miller discussed Shantha's use of Metabolic Hyperthermia Therapy (MHT), which Shantha used in cancer treatment. Miller indicated that she and another employee, Pam Yang, were told not to put "MHT" in patient files. Miller indicated the entire Integrated Medical Specialists staff knew that MHT was just another name for DNP. (Kuykendall affidavit, ¶ 19).

Miller informed Special Agents Kuykendall and Badolato of a Web site, www/imsmd.com/cancer, utilized by Shantha for advertising and recruiting new patients. Special Agents Kuykendall and Badolato reviewed the Web site, which described Metabolic Oncolysis (Hyperthermia) Therapy (MHT) and other treatments/drugs given in connection with the MHT. The site stated, "More than 54 advanced cancers have been treated using this therapy. Many of these cases were stated that there is no more treatment available, and told them to go home. With this treatment alone their cancers were shrunk and many of them led a good long life." The site also stated, (combining) "Insulin potentiation therapy (IPT), hyperthermia, endorphin receptor

therapy, high dose vitamin C, HDMTX therapy, sodium phenyl butyrate, vaccines, tumor antigens, Dendritic cell therapy, aloe, cellbal, Mistletoe etc. which are offered at our center can surely heal the Cancers and other disease." The Web site listed the drug "sialor" and indicated the drug is unapproved, but can be found at Integrated Medical Specialists. (Kuykendall affidavit, ¶ 20).

On August 21, 2003, Michele Cawyer, Fraud Investigator for United Health Care, told Special Agent Badolato that United Health Care would not have knowingly authorized payment for any claim associated with treatment of Colloidal Silver, Aloe, or hyperthermia therapy. (Kuykendall affidavit, ¶ 21).

On August 28, 2003, Cawyer provided information specific to Mr. David Bean, a Colorado man receiving treatment from Shantha. According to Cawyer, Shantha has submitted numerous claims for payment in treating prostate cancer and hypertension. Cawyer indicated that Shantha sent United Health Care a letter regarding treatment of David Bean. The letter states that, "As Mr. Bean is physically incapable of coming here, I have recommended an herbal preparation for his continued use until such time as he is able to come to my clinic. This preparation, Dr. Bartoli's RX, is an herbal modality (similar to Hansi but

improved). Clinical studies of over 15 years show Dr. Bartoli's RX acts first by improving the immune system, and secondly by reactivating and rebuilding the body's systems. It relieves pain, restores appetite and energy, slows further deterioration, and enhances quality of life. Thus, the immune system is better able to fight the cancer. Dr. Bartoli's RX is specifically designed to treat Mr. Bean's prostate cancer and is administered by the patient orally, and intramuscularly." Cawyer indicated Shantha was treating Bean by shipping this non-FDA approved drug to him. Cawyer indicated that Shantha submitted claims to United Health Care for six dates of service when no medical services were provided due to the distance between Shantha and Bean. (Kuykendall affidavit, ¶ 22).

On September 4, 2003, Lynn Anderson, Special Investigator for Ingenix, spoke to Kim (Last Name unknown), Medical Records Manager at Integrated Medical Specialists. Kim indicated Bean had never been in the clinic and only receives non-FDA approved supplies from Shantha. (Kuykendall affidavit, ¶ 23).

On August 28, 2003, Special Agent Kuykendall interviewed Rick Ragan regarding treatment he received from Shantha and Bartoli at Integrated Medical Specialists. Ragan stated he was diagnosed with Lyme disease in September 2001. Following

research of available treatment, he emailed Dr. Nick Bachynsky in Italy regarding the possibility of Ragan receiving Intra Cellular Heat Therapy (ICHT). Ragan said that within a few days of his email, he received an email response from Mr. Richard D'Agistino who stated that Ragan could go to Italy for the treatment or could go to Atlanta, Georgia, where the same treatment was being conducted by Shantha. D'Agistino told Ragan that Shantha and Bachynsky were part of a newly formed corporation. Ragan stated he traveled to Stockbridge, Georgia in June 2002 and received treatments from Shantha for eight days, which included ICHT. Ragan stated that the ICHT consisted of injections of Insulin, Doxycycline, Rocephin, and Colloidal Silver. Ragan stated that a main part of the IV treatment was the injection of a "heating agent" which was supposed to heat cells and kill them. Ragan stated the heating agent was yellow. He also stated that the substance did not really heat him up, but did make his heart race. Ragan stated that during his treatment, he sensed a lot of tension in the office and approached a female medical assistant to inquire about it. The woman told him she could not talk in the clinic, but he should research DNP because she felt uncomfortable about using it to treat patients. Ragan said he researched DNP and was upset that

he was probably treated with it as a "heating agent," so later confronted Shantha. Ragan stated when he went into Shantha's office, Shantha was just getting off the phone and stated, "That was Europe. They're pissed that I'm using DNP." According to Ragan, when asked if DNP had been used on him, Shantha replied, "only once and only a little." Ragan also discussed the use of a homemade "box" made by Dan Bartoli that diagnosed his condition. Ragan provided information regarding his insurance being billed by the ICM for his treatment. Ragan's insurance company was billed and paid Shantha more than \$19,000. (Kuykendall affidavit, ¶ 24).

On September 11, 2003, Special Agent Kuykendall received a video tape from a cooperating witness employed by Integrated Medical Specialists. The video was recorded per the request of Shantha. The video depicts a tour of the Integrated Medical Specialists clinic given by Bartoli, who introduces himself as "Dr. Dan Bartoli." The following excerpts were taken from the video: When looking inside an office with two computers and two printers, Bartoli states, "this is where we do our ... our insurance coordinator works out of this one uh, she files electronically with several insurance companies. It's been a real boom to our operation. [Second take]. This office over

here is for Kim, who is our insurance coordinator. Although we're not directly plugged into any insurance company, she files on our patients' behalf and has done quite a good job getting compensation when it's available. We have a capability here of filing electronically, which speeds up the process and it's been pretty lucrative for both us and the patient." Stepping into another room, Bartoli states, "This is our large laboratory where we make up many of our chemo-therapeutic agents as well as chelation therapy and different intravenous stuff is all prepared back here. Some of the intravenous therapies we do are traditional, some are non-traditional." (Kuykendall affidavit, ¶ 25).

The video also shows Shantha explaining his treatment of an individual who has cancer. Shantha points to the catheter (IV) in the patient's abdomen and says, "We are injecting hyperthermia liquid along with chemotherapy agents..." Dr. Shantha holds up the patient's arm and says, "Now he's undergoing hyperthermia. You can see he's sweating profusely." Shantha also describes treatment used on two other patients and indicates the patients are being treated through hyperthermia. (Kuykendall affidavit, ¶ 26).

On August 7, 2003, Special Agent Kuykendall was given computer disks by a cooperating witness employed at Integrated Medical Specialists. The disks contain files that were observed on Shantha's computer while the witness was working at Shantha's request. Below are titles of the 22 files stored on Shantha's computer, which refer to DNP:

- Bachynsky about DNP to Soile and others 12-19-02
- Cancer-DNP-patient program outlines for cancers-1
- DNP-patient program outlines-OBESITY-1
- Cancer-DNP-patient program outlines for cancers-11-15-02 Cone-1998, 4727234-DNP
- DNP- CHEMICAL REPOSITORY
- DNP overall view
- DINTROPHENOL
- DNP-1
- DNP-2
- DNP-3
- DNP-ITS USE WITH IPT IN CANCERS 7-22-01
- DNP-Obesity outlines-10-1-01
- DNP-Obesity outlines-10-1-01-1
- DNP-patient program outlines for cancers
- DNP-patient program outlines-OBESITY

- DNP-patient program outlines-OBESITY-1
- DNP-Wonderful figures
- Metabolism Problem Set
- Helvetia-complaint about the use of DNP
- Hyperthermia, can we reverse it with DNP
- Obesity outline smaller version- DNP
- Yeast and DNP-- Process and Content

(Kuykendall affidavit, ¶ 27).

On September 26, 2003, Special Agent Kuykendall re-interviewed Cynthia Bush. Bush reiterated information provided in her July 18, 2003 interview with Special Agents Stephan and Badolato, regarding Shantha. Bush stated that Dr. Shantha performs a treatment called Dendritic Cell Therapy for cancer patients. Bush described Dendritic Cell Therapy as a process whereby the patient provides a urine sample and the urine was "processed" and injected back into the patient's body. Bush indicated the procedure is illegal in Georgia, so the physicians send it outside the state to be modified. Bush recalled patients received two weeks of treatment and were charged \$7,000 in advance, paid by credit card. Bush indicated some patients' insurance companies were billed for this treatment. According to Bush, one of the patients who received Dendritic Cell Therapy

was Martha Gallovits, now deceased. (Kuykendall affidavit, ¶ 28).

Bush indicated that Shantha administered IV Colloidal Silver. Bush indicated that Shantha and Bartoli made the IV Colloidal Silver in a small laboratory in the back of the office at 115 Eagle Spring Drive, Ste A, Stockbridge, Georgia. Bush stated that Bartoli is not a physician, but treats patients with acupuncture and provides IV Colloidal Silver injections to patients. Bush also said that Shantha instructed her how to bill insurance companies for the IV Colloidal Silver treatment. (Kuykendall affidavit, ¶ 29).

Bush indicated that Shantha treated cancer patients with an IV form of aloe vera. Bush indicated the method of billing and the cost of treatments varied from day to day. Bush indicated patients were asked for payment in advance of treatment and were told their insurance would also be billed. Bush indicated United Health Care and Blue Cross Blue Shield of Georgia paid well. (Kuykendall affidavit, ¶ 30).

On September 29, 2003, Special Agent Kuykendall reviewed an advertisement placed in the September 2003 issue of Alternative Medicine advertising treatment by Shantha at Integrated Medical Specialists. The advertisement refers to the use of hyperbaric

therapy, IPT, Sialor, Intra Cellular Hyperthermia, and other treatments and drugs. (Kuykendall affidavit, ¶ 31).

On September 29, 2003, Special Agent Kuykendall reviewed an ad in the Atlanta Journal-Constitution for treatment by Shantha at Integrated Medical Specialists. The advertisement references the use of hyperbaric oxygen therapy, IPT, Ukrain, and Intracellular Hyperthermia. The ad reads, "We treat cancers and other incurable diseases." (Kuykendall affidavit, ¶ 32).

On September 30, 2003, Special Agent Kuykendall received information from Flora H. Chang, Office of Compliance, Center for Drug Evaluation and Research, United States Food and Drug Administration, regarding drugs by Shantha at Integrated Medical Specialists. Chang stated that she has caused a diligent search of the official records of FDA that list all approved New Drug Applications (NDAs), Abbreviated New Drug Applications (ANDAs), and Investigational New Drug Applications (INDs) for the following products/substances being utilized in treatment of patients by Shantha, Bartoli, and others at Integrated Medical Specialists. Chang stated that there are not any approved NDAs or ANDAs for these substances: 2,4 DNP, or DNP, RNA, or Ribonucleic Acid of Jamaican Sea Urchins, Colloidal Silver, and Mannose Whole Leave Aloe Extract. (Kuykendall affidavit, ¶ 33).

On October 1, 2003, Special Agent Kuykendall re-contacted Zoltan Gallovits to confirm treatment his mother (now deceased) received from Shantha. Gallovits stated that, in addition to the substances contained in the five bottles he previously provided to Ms. Bush, his mother was treated with an unknown yellow substance from a large IV bag. Gallovits assumed it was Vitamin C because the Vitamin C was also yellow. However, this IV caused his mother to sweat profusely, to the point where you could see sweat in her shirt. Gallovits asked why his mother was sweating so much, and Shantha told him it was good sign and that the treatment was working. Gallovits stated that his mother also developed mouth sores a week after this treatment. Gallovits stated that, before treatment by Shantha, his mother was able to walk and had very little trouble breathing. After the treatment, however, his mother could not walk and could not breathe without oxygen support. Gallovits stated he paid Shantha \$22,000 up front, and Shantha also billed his insurance company. (Kuykendall affidavit, ¶ 34).

Individuals involved in any business whereby extensive records are generated utilize computers, computer software, and electronic media storage devices such as floppy disks and computer hard drives to store evidence of their crimes. Such

records and programs are commonly located and extracted through a forensic computer examination and "mirroring" process conducted by Special Agents of the Food and Drug Administration/Office of Criminal Investigations or FBI, all of whom have been trained in recovery of computer information. (Kuykendall affidavit, ¶ 36).

Hence, the affidavit, as a whole, established probable cause to believe that a review of Shantha's records with respect to all of his patients would reveal a pervasive scheme of health-care fraud. See United States v. Conley, 4 F.3d 1200, 1207 (3d Cir. 1993)(pointing out that the magistrate is entitled to draw normal inferences from the facts set forth in the affidavit).

To the extent possible, a search warrant typically limits a search for records according to the type of fraud being committed, the persons involved, and the time frame. In this case, Shantha and Bartoli were not committing only one type of health-care fraud; they were defrauding patients and insurance companies using a variety of means. Thus, the warrant could not be limited to documents pertaining only to one specific type of fraud. Accordingly, all of the treatment records and billing records were needed. Given the wide-ranging scope of the, the

affidavit was as specific as the circumstances would allow. See United States v. Blum, 753 F.2d 999, 1001 (11th Cir. 1985)("a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit").

If we assume that the affidavit supports a finding of probable cause to believe that Shantha and Bartoli injected numerous patients with unapproved and misbranded drugs, including DNP, and that Shantha and Bartoli defrauded numerous health insurance companies by submitting false and misleading claims for payment, which disguised the types of drugs and treatments they were providing to patients at the clinic, then the question becomes: Are the categories of documents listed in the warrant proper evidence of these crimes? See United States v. American Investors of Pittsburgh, Inc., 879 F.2d at 1106. Logic and common sense tell us that they are.

The court need not decide whether the warrant was too broad, however, because the search falls within the "good faith" exception set forth in Leon, 468 U.S. at 922. See United States v. Travers, 233 F.3d 1327 (11th Cir. 2000).

(C) Whether the search exceeded the scope of the warrant.

Defendants argue that "everything" seized was outside the scope of the warrant because the warrant contained no dates or time frame to limit the search. (Defendants' brief at 37). It is important to note, however, that defendants have not identified any specific documents that they contend were generated prior to the criminal activity described in the affidavit that accompanied the warrant. Furthermore, defendants' argument ignores the fact that Shantha and Bartoli were involved in a pervasive scheme to defraud. Under such circumstances, the Eleventh Circuit has categorically stated that "all the business records of the enterprise may properly be seized." Sawyer, 799 F.2d at 1508. Therefore, it was not necessary for the search to be limited to any particular dates.

(D) Whether there was probable cause to issue the warrant.

The magistrate judge's task "is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Reviewing courts must ask only whether the magistrate

judge had a "substantial basis" for concluding that probable cause existed and must give "great deference" to the magistrate judge's assessment of the facts presented to him. Id. at 236, 238; accord Spinelli v. United States, 393 U.S. 410, 419 (1969); United States v. Conley, 4 F.3d 1200, 1205 (3d Cir. 1993).

(1) Whether probable cause was established for the search and seizure.

"[T]he nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation." United States v. Lockett, 674 F.2d 843, 846 (11th Cir.1982). Special Agent Kuykendall's affidavit clearly established probable cause to search Shantha's office for the documents identified in "Attachment B" to the application and warrant. The affidavit established a connection between Shantha/Bartoli and the office to be searched and a link between the criminal activity and the office to be searched. See United States v. Martin, 297 F.3d 1308, 1314 (11th Cir. 2002)(holding that "the affidavit should establish a connection between the defendant and the residence to be searched and a link between the residence and any criminal activity."). For example, Special Agent Kuykendall noted that, on January 7, 2003, he visited Shantha's office at 115 Eagle Spring Drive, Suite A,

Stockbridge, Georgia, 30281, in an undercover capacity. (Kuykendall affidavit, ¶ 9). Bartoli met with Special Agent Kuykendall and introduced himself as Shantha's patient coordinator. (Kuykendall affidavit, ¶ 9). Bartoli also gave Special Agent Kuykendall a tour of the clinic and discussed Shantha's use of DNP as well as Bartoli's use of a homemade device that he claimed enables him to identify and diagnose diseases by having a patient lick a piece of paper so that he can read their DNA. (Kuykendall affidavit, ¶ 9). During the tour, Special Agent Kuykendall observed numerous files and records related to the treatment of patients. (Kuykendall affidavit, ¶ 9). As specified in Section (B), *supra*, Special Agent Kuykendall also noted in his affidavit that he had interviewed numerous patients who had been treated with DNP and other unapproved drugs at Shantha's clinic, as well as various former employees who had worked there and had personally observed Shantha's use of DNP and other unapproved substances. Furthermore, as noted previously, Special Agent Kuykendall provided numerous examples of Shantha's fraudulent billing practices.

The information contained in Special Agent Kuykendall's affidavit was more than sufficient to support a finding of

probable cause. In fact, the government submits that Special Agent Kuykendall did an admirable job, in the heat of a serious criminal investigation, of providing as much detail and information as he had at the time the affidavit was prepared. The Supreme Court has stated that "affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and court in a common sense and realistic fashion. They are commonly drafted . . . in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." United States v. Ventresca, 380 U.S. 102, 108 (1965).

(2) Whether the affidavit contained sufficient information regarding the veracity and basis of knowledge of Shantha's former employees who provided information to the government.

The Eleventh Circuit has held that, "[i]f an informant is mentioned in the affidavit, the affidavit must also demonstrate the informant's veracity" and basis of knowledge. However, when there is sufficient independent corroboration of an informant's information, there is no need to establish the veracity of the informant." Martin, 297 F.3d at 1314 (citations and punctuation omitted). In this case, there was sufficient independent

corroboration of the informants' information; hence, there was no need to establish the veracity of the informants.

(3) Whether the information in the affidavit was stale.

To satisfy the probable cause standard, the government must reveal facts that make it likely that the items being sought are in that place when the warrant issues. For probable cause to exist, however, the information supporting of the government's application for a search warrant must be timely, for probable cause must exist when the magistrate judge issues the search warrant. . . . Ultimately, however, even stale information is not fatal if the government affidavit updates, substantiates, or corroborates the stale material.

United States v. Harris, 20 F.3d 445, 450 (11th Cir. 1994)(citations omitted).

No mechanical test exists for determining when information becomes fatally stale; rather, staleness is an issue which must be decided on the peculiar facts of each case. In general, the basic criterion as to the duration of probable cause is the inherent nature of the crime. . . . [W]here an affidavit recites a mere isolated violation then it is not unreasonable to believe that probable cause quickly dwindles with the passage of time. On the other hand, if an affidavit recites activity indicating protracted or continuous conduct, time is of less significance. Protracted and continuous activity is inherent in large-scale [fraud schemes]. In such cases, then, the staleness issue should be construed liberally.

United States v. Williams, No. 04-14914, 2006 WL 1071232, at *6 (11th Cir. April 24, 2006)(citing United States v. Bascaro, 742 F.2d 1335, 1345-46 (11th Cir.1984). "In addition to the length of time, courts should consider the nature of the suspected crime (discrete crimes or ongoing conspiracy), habits of the accused, character of the items sought, and nature and function of the premises to be searched." United States v. Bervaldi, 226 F.3d 1256, 1262 (11th Cir. 2000)(citations and punctuation omitted). Here, the nature of the suspected crime (ongoing scheme to defraud), the character of the items sought (mainly business and medical records and unapproved drugs), and the nature and function of the premises to be searched (a medical office) are all factors that indicate the freshness of the information in the affidavit would not be a problem. Occupancy of an office building, "like protracted and continuous criminal activity, generally is not transitory or ephemeral, but instead endures for some length of time." Bervaldi, 226 F.3d at 1265.

In the probable cause context, the Eleventh Circuit has found that information can remain fresh for longer than the period of time at issue here. For example, in United States v. Hooshmand, 931 F.2d 725, 735-36 (11th Cir. 1991), the Eleventh

Circuit found that an eleven-month-old report from an informant of his employer's fraudulent activities was not stale where the activities were protracted and ongoing and that it was sufficient to support probable cause for a warrant. Similarly, in Harris, the Eleventh Circuit noted that most of the information contained in the affidavit referred to events that took place over two years before the officer applied for the warrant; nevertheless, the affidavit alleged a longstanding and protracted conspiracy and a continuing relationship between the coconspirators; therefore, the court concluded that the information was not fatally stale. 20 F.3d at 451. In the instant case, since the fraud was pervasive, the staleness issue should be construed in favor of the government.

(E) Whether false information was knowingly, intentionally, or recklessly included in the affidavit.

Defendants contend that the evidence seized as a result of the search warrant should be suppressed because the affidavit submitted in support of the warrant contained false information. In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court held, where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in

the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. 438 U.S. at 156. Thereafter, if, at that hearing, the defendant establishes the allegation of perjury or reckless disregard by a preponderance of the evidence, the court must consider whether the search warrant must be voided and the fruits of the search suppressed. Id.

In the present case, defendants have failed to make such a preliminary showing and are not entitled to a hearing on this issue. Defendants have provided no credible evidence whatever to show that any false statement was included in the affidavit supporting the search warrant, much less that it was included knowingly, intentionally, or recklessly. Furthermore, defendants have presented no evidence to suggest that Shantha's former employees who provided information to the government lied or had any motive to lie. To the contrary, the information provided by the former employees was consistent with, and corroborated by, other facts that were included in the affidavit. In other words, Special Agent Kuykendall had no reason to believe that the statements of these former employees were false.

(F) Whether defendants' Fourth Amendment rights were not violated by any cooperating individuals.

There is no evidence to support defendants' argument that Shantha's employees acted as agents of the government when they provided evidence to Special Agent Kuykendall. Under the case cited by defendants on page 56 of their brief, United States v. Dahlstrom, 180 F.3d 677 (5th Cir. 1999), defendants would have to show that: (1) the government offered one of the individuals in question some form of compensation for the search; (2) the individual did not initiate the idea of the search on his own; and (3) the government knew that the individual intended a search. This they cannot do. Accordingly, defendants' Fourth Amendment rights were not violated.

(G) Whether the Leon "good faith" exception applies.

Defendants' motion to suppress alleges generally that the warrant issued by the magistrate is invalid and therefore the evidence seized pursuant to the warrant is inadmissible. Defendants argue that insufficient facts in the supporting affidavit, as well as the unreliability of the government informants, renders the warrant invalid. Assuming for the purposes of this motion that these allegations are true, defendants' argument must fail in light of the good faith exception announced in United States v. Leon, 468 U.S. at 922.

Leon "stands for the principle that courts generally should not render inadmissible evidence obtained by police officers acting in reasonable reliance upon a search warrant that is ultimately found to be unsupported by probable cause." Martin, 297 F.3d at 1313. The Leon good faith exception applies unless:

- (1) Special Agent Kuykendall misled the magistrate issuing the warrant with "information in an affidavit that the Special Agent Kuykendall knew was false or would have known was false except for his reckless disregard of the truth";
- (2) "the issuing magistrate wholly abandoned [her] judicial role";
- (3) the warrant is based on an affidavit so "lacking in indicia of probable cause" as to render the executing officers' belief in its existence "entirely unreasonable"; or
- (4) the warrant is so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid.

Leon, 468 U.S. at 923.

None of those things occurred in this case. First, no evidence suggests that Special Agent Kuykendall presented the Magistrate with information that he knew was false or would have known was false except for his reckless disregard of the truth. On the contrary, the evidence shows that Special Agent Kuykendall acted in objective good faith when applying for and

executing the warrant. Special Agent Kuykendall did not intentionally omit facts that would have defeated a finding of probable cause. "The exclusionary rule is meant to guard against police officers who purposely leave critical facts out of search warrant affidavits because these facts would not support a finding of probable cause. This is not the case here." Id.

The Leon good faith exception requires suppression "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. The purpose of the exclusionary rule is to deter unlawful police misconduct; therefore, when officers engage in 'objectively reasonable law enforcement activity' and have acted in good faith when obtaining a search warrant from a judge or magistrate, the Leon good faith exception applies.

Martin, 297 F.3d at 1313 (citations omitted). "Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." Leon, 468 U.S. at 922.

Second, there is no evidence that the Magistrate wholly abandoned her judicial role in issuing this warrant, nor do defendants contend that that happened.

Third, it was not entirely unreasonable for Special Agent Kuykendall to believe that what he wrote in the affidavit would be sufficient to support a finding of probable cause. "The affidavit contained sufficient indicia of probable cause to enable a reasonable officer to execute the warrant thinking it valid." Martin, 297 F.3d at 1315.

Fourth, the warrant was not so facially deficient that Special Agent Kuykendall could not reasonably have presumed it to be valid. The warrant need not contain all the facts set forth in the affidavit; rather, it simply must describe with sufficient particularity the location to be searched and the items to be seized. Maryland v. Garrison, 480 U.S. 79, 84 (1987).

Here, the application for the warrant and the warrant itself identified the place to be searched as "Integrated Medical Specialists, 115 Eagle Spring Drive, Suite A, Stockbridge, Georgia, 30281." "Attachment A" to the warrant, which was incorporated therein by express written reference, included two photographs of the exterior of the building to be searched and further identified the building as "a two-story brick and tan stucco medical office building." In addition, "Attachment A" stated that "Suite A within 115 Eagle Spring

Drive is on the left side of the lower level of the building. A green and white directional sign in the front parking lot indicates such. Further, Suite A's main entrance is a glass door with the following information on its surface: Suite A, Integrated Medical Specialists, Dr. T.R. Shantha, M.D., Ph.D., F.A.C.A., 770-474-4019, By Appointment Only, 8:30-5:00 Mon-Fri."

The affidavit here is not a "bare-boned" affidavit, that is, one that "contains nothing more than conclusory allegations." United States v. Glinton, 154 F.3d 1245, 1257 (11th Cir. 1998). Whenever a warrant application is supported by more than a "bare boned" affidavit consisting of wholly conclusory statements, the executing officers reasonably may rely on the warrant's validity. United States v. Pigrum, 922 F.2d 249, 252 (5th Cir. 1991); United States v. Broussard, 80 F.3d 1025, 1035 (5th Cir. 1996). Because Special Agent Kuykendall's affidavit was not "bare-boned," his reliance upon this existence of probable cause therein was not entirely unreasonable.

In sum, Special Agent Kuykendall acted in good faith when he requested and obtained the warrant to search Shantha's office. Consequently, the validity of the warrant does not

affect the admissibility of evidence seized as a result of the search. Leon, 468 U.S. at 918-20.

CONCLUSION

For all of the foregoing reasons, defendants' motion to suppress should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 10, 2006, I electronically filed the foregoing **GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO SUPPRESS** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to defendants' attorneys of record:

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